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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re K.S., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. K.S., Defendant and Appellant.	A144792 (Alameda County Super. Ct. No. SJ1524182)

K.S. appeals from a juvenile court order declaring him to be a ward of the court and placing him on probation after he admitted to possessing a BB gun on school grounds, a misdemeanor. One of his probation conditions requires him to submit to warrantless searches of his "electronics including passwords." He argues that this condition must be stricken because it (1) permits illegal eavesdropping under Penal Code section 632, (2) is not reasonable under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*), and (3) is unconstitutionally overbroad.[1]

This division recently decided a case, *In re Ricardo P.* (2015) 241 Cal.App.4th 676 (*Ricardo P.*), involving an identical probation condition imposed by the same Alameda County juvenile court. Relying on our opinion in *Ricardo P.*, from which much

[1] All further statutory references are to the Penal Code unless otherwise noted.

of the following discussion is drawn, we conclude that the condition here is valid under section 632 and *Lent, supra,* 15 Cal.3d 481 but is overbroad because it infringes on K.S.'s rights to privacy and expression without being sufficiently tailored. We therefore modify the condition to limit the types of electronic information that may be searched, but we otherwise affirm the judgment.

I.
FACTUAL AND PROCEDURAL BACKGROUND

In January of this year, when he was a 15-year-old sophomore at Berkeley High School, K.S. brought an unloaded BB gun to school.[2] K.S. revealed to school personnel that he had the gun after he was implicated in prior fights at school at which a gun was seen. He explained that he had been attacked by the students involved in those fights and brought the gun to school intending "to . . . scare the minor[]s that continued to threaten him," not to harm anyone.

The Alameda County District Attorney filed a petition under Welfare and Institutions Code section 602, subdivision (a) seeking to have K.S. declared a ward of the court. As amended, the petition alleged one misdemeanor count of possessing a BB gun on school grounds.[3] K.S. admitted the allegation, and at the dispositional hearing, the juvenile court declared him a ward of the court and placed him on probation. One of the probation terms prohibits him from possessing, owning, or handling various weapons and explosives, and another one requires him to "[s]ubmit person and any vehicle, room[,] or property, electronics including passwords under [his] control to search by Probation

[2] The facts in this paragraph are drawn from a February 2015 probation report.

[3] The allegation was made under section 626.10, subdivision (a).

Officer or peace office[r] with or without a search warrant at any time of day or night."[4] We shall refer to the portion of the latter condition permitting searches of "electronics including passwords" as the electronics search condition. This condition has been determined to "include both data stored on electronic devices and data in electronic accounts accessed through those devices."[5]

K.S. orally objected to the electronics search condition but did not specify a basis. In response, the juvenile court stated, "I find that electronic supervision is very, very important, particularly in this [case involving] possessing guns. Many minors go on and use electronics to display themselves possessing weapons and showing themselves possessing weapons, and so it's a very important part of our supervision to have electronic search conditions."

II.
DISCUSSION

A. K.S. Lacks Standing to Pursue His Claim Under Section 632.

Section 632, subdivision (a) provides that "[e]very person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio," is subject to a fine, incarceration, or both. K.S. argues that the electronics search condition must be stricken because it "poses a risk of illegal eavesdropping" and

[4] The quoted search-condition language appears in the minute order from the dispositional hearing. In its oral pronouncement, the juvenile court used slightly different language and omitted the phrases "under [his] control" and "with or without a search warrant," but the minute order's language appears in the probation order that K.S. signed. Under these circumstances, we conclude the written condition controls. (See *People v. Pirali* (2013) 217 Cal.App.4th 1341, 1346.)

[5] *Ricardo P.*, *supra*, 241 Cal.App.4th at p. 682 [interpreting the scope of identical condition]. The record and parties' briefing here provide no reason to depart from this interpretation.

"[o]therwise, individuals with whom K.S. communicates [electronically] may have claims under section 632."

Initially, it appears that K.S. forfeited this claim, although the Attorney General does not claim that he did. K.S. never argued below that the electronics search condition was invalid because it could give rise to illegal activity under section 632.

Even if K.S. had properly preserved the claim, we would reject it because he lacks standing to assert it. He primarily argues that the electronics search condition might violate the privacy of the people with whom he communicates, not his own. But as explained in *Ricardo P.*, *supra*, 241 Cal.App.4th 676, we do " 'not consider issues tendered by a person whose rights and interests are not affected.' " (*Id.* at p. 683.) Because K.S.'s section 632 claim is dependent on the rights and interests of other parties, we will not consider it. (*Ibid.*)

B. The Electronics Search Condition Is Reasonable Under Lent.

K.S. also argues that the electronics search condition must be stricken because it is invalid under *Lent*, *supra*, 15 Cal.3d 481. We disagree.

When a minor is made a ward of the juvenile court and placed on probation, the court "may impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." (Welf. & Inst. Code, § 730, subd. (b); see also *id.*, § 202, subd. (b).) " 'In fashioning the conditions of probation, the . . . court should consider the minor's entire social history in addition to the circumstances of the crime.' " (*In re R.V.* (2009) 171 Cal.App.4th 239, 246.) The court has "broad discretion to fashion conditions of probation" (*In re Josh W.* (1997) 55 Cal.App.4th 1, 5), although "every juvenile probation condition must be made to fit the circumstances and the minor." (*In re Binh L.* (1992) 5 Cal.App.4th 194, 203.) We review the imposition of a probation condition for an abuse of discretion (*People v. Olguin* (2008) 45 Cal.4th 375, 379 (*Olguin*)), taking into account "the sentencing court's stated purpose in imposing it." (*People v. Fritchey* (1992) 2 Cal.App.4th 829, 837.)

Although a juvenile court's discretion to impose probation conditions is broad, it has limits. (*In re D.G.* (2010) 187 Cal.App.4th 47, 52.) Under *Lent*, which applies to both juvenile and adult probationers, a condition is "invalid [if] it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality.' " (*Lent*, *supra*, 15 Cal.3d at p. 486; *In re Josh W.*, *supra*, 55 Cal.App.4th at pp. 5-6.) "This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term." (*Olguin*, *supra*, 45 Cal.4th at p. 379.)

Before addressing the merits of this claim, we question whether K.S. properly preserved it. Although he objected below to the electronics search condition, he did not specify any grounds for doing so. The failure to object that a probation condition is unreasonable under *Lent*, *supra*, 15 Cal.3d 481 generally forfeits the contention on appeal. (*In re Vincent G.* (2008) 162 Cal.App.4th 238, 246; see also *People v. Welch* (1993) 5 Cal.4th 228, 235.) But even if we assumed that K.S. properly preserved the claim, we would conclude that it fails for substantive reasons. Although the electronics search condition satisfies the first two prongs under *Lent* required to invalidate a condition, it does not satisfy the third.

The first prong under *Lent*, *supra*, 15 Cal.3d 481 that must be met to invalidate a probation condition requires the condition to have no relationship to the offender's crime. K.S. argues that the electronics search condition has no relationship to his crime because "[t]he record contains no evidence that [he] used electronics or social media in connection with his bringing the pellet gun to school in his backpack" or even that he owned or had used electronic devices. In response, the Attorney General contends that the juvenile court "implicitly [found] . . . the first *Lent* factor" was not met based on references to social-media communications in the probation report. The probation report states, "[K.S.] admitted that he became involved in his cousin's 'drama.' His cousin, who also attends Berkeley High School, had several individuals threaten him on social

media. [K.S.] initially became involved with his cousin's problems because he did not want his cousin to get hurt."

We agree with K.S. that the probation report's mention of social media provides an insufficient basis for concluding that electronics played a role in his crime. The report reveals only that K.S. learned that his cousin was threatened through social media, not that K.S. himself used social media in any way in relation to his crime. (Cf. *People v. Ebertowski* (2014) 228 Cal.App.4th 1170, 1172-1173, 1176-1177 [upholding similar condition where defendant's offenses were "plainly gang related" and " 'defendant ha[d] used social media sites historically to promote the . . . gang' "].) Moreover, even if social media could somehow be blamed for K.S.'s initial involvement in the conflict with other students, there is no suggestion that K.S. was influenced to commit the actual crime—bringing the BB gun to school—by social media or for any reason other than being attacked himself. We conclude that the first prong of *Lent, supra,* 15 Cal.3d 481 is met here because the electronics search condition has no relationship to K.S.'s offense.

The second prong required to invalidate a probation condition—that the condition relates to conduct that is not itself criminal—is also met here, because there is nothing inherently illegal about using electronic devices. (*Ricardo P., supra,* 241 Cal.App.4th at pp. 684-685; *In re Erica R.* (2015) 240 Cal.App.4th 907, 913.) The Attorney General acknowledges that "as a general matter, using electronic devices is not illegal," and she fails to offer any persuasive argument for why we should nevertheless determine that the second prong is not met.

We conclude, however, that the third prong required to invalidate a probation condition is not met because the electronics search condition is reasonably related to future criminality. Under *Olguin, supra,* 45 Cal.4th 375, "a probation condition 'that enables a probation officer to supervise his or her charges effectively is . . . "reasonably related to future criminality" ' and does not satisfy the third prong required to invalidate a condition under *Lent* 'even if [the] condition . . . has no relationship to the crime of which a defendant was convicted.' " (*Ricardo P., supra,* 241 Cal.App.4th at p. 686, quoting *Olguin,* at pp. 380-381.) Here, as in *Ricardo P.*, the condition reasonably relates to

enabling the effective supervision of the minor's compliance with other probation conditions. (*Ricardo P.*, at p. 686.) Specifically, the condition enables peace officers to review K.S.'s electronic activity for indications that he has weapons or is otherwise engaged in activity in violation of his probation. And we cannot say that the juvenile court's given reason for imposing the condition—that minors are apt to use electronic devices to show off their possession of weapons—is "speculative or that the court's reliance on it to impose the electronics search condition was so outside the bounds of reason as to constitute an abuse of discretion." (*Ibid.*) Nor do we find the lack of "evidence that K.S. used electronics and social media to communicate about anything illegal or even used social media at all" to preclude the imposition of the condition, because no "connection between a probationer's past conduct and the locations that may be searched [is required] to uphold a search condition under *Lent, supra,* 15 Cal.3d 481." (*Ricardo P.*, at p. 687.)

Two other divisions of this court have issued published opinions on electronics search conditions since we decided *Ricardo P.*, *supra*, 241 Cal.App.4th 676. Division Five followed *Ricardo P.* (*In re Patrick F.* (2015) 242 Cal.App.4th 104), and Division Three did not (*In re J.B.* (Nov. 25, 2015, A144396) __ Cal.App.4th ___). In declining to follow *Ricardo P.*, *J.B.* held that an electronics search condition is unreasonable under *Lent, supra,* 15 Cal.3d 481 whenever the ward's crime did not involve electronics and there is no "reason to believe the minor's cell phone will be used for an improper purpose" in the future. (*J.B.*, slip op. pp. 6-7, 10.) Nothing in *J.B.*'s analysis persuades us to depart from our holding in *Ricardo P.* We continue to believe that, regardless of whether the ward's crime involved electronics, a juvenile court acting in *parens patriae* has the discretion to authorize searches of limited areas of a minor's electronic data to permit supervision of the minor's compliance with probation terms. In our view, categorically immunizing wards' electronics use from oversight is legally unsound and could jeopardize wards' successful supervision and rehabilitation.

We have at least two disagreements with *J.B.*'s analysis. First, it conflates reasonableness under *Lent* with related, but separate, constitutional considerations, such

as privacy. Under *Lent*, a probation condition, even one that has no relationship to the offender's crime, is valid if it is reasonably related to future criminality. (*Lent, supra,* 15 Cal.3d at p. 486.) Whether a condition is reasonable under *Lent* does not turn on "the impact of the condition on the defendant's constitutional rights." (*Gilliam v. Municipal Court* (1979) 97 Cal.App.3d 704, 708.)

Second, and more importantly, *J.B.*'s analysis downplays the significance of the two most central characteristics of wards: that they are children and that they have been found to have engaged in criminal behavior. In attempting to distinguish *Olguin, supra,* 45 Cal.4th 375 on the basis that it involved an adult (*J.B., supra,* __ Cal.App.4th __ [slip op. p. 8]), *J.B.* gets it backward: the privacy of minors is entitled to *less* protection than the privacy of adults because minors' constitutional rights are more circumscribed. True enough, children have constitutional rights, including a right to privacy. (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 370.) And, as we discuss below in section II.C., restrictions on these rights cannot be so sweeping as to be constitutionally overbroad. But even law-abiding children have a more limited right to privacy than adults have. (*In re Carmen M.* (2006) 141 Cal.App.4th 478, 492-493.) " '[The] liberty interest of a minor is qualitatively different than that of an adult, being subject both to reasonable regulation by the state to an extent not permissible with adults [citations], and to an even greater extent to the control of the minor's parents . . . .' " (*In re Eric J.* (1979) 25 Cal.3d 522, 530.) And when a child is declared a ward, these rights are permissibly limited even *further* because the child has engaged in criminal behavior, and the juvenile court acts in *parens patriae,* thus "assum[ing] the parents' authority to limit the minor's freedom of action." (*Ibid.*; see also *Ricardo P., supra,* 241 Cal.App.4th at p. 688.) *J.B.*'s reliance on *Riley v. California* (2014) 573 U.S. __, 134 S.Ct. 2473 overlooks that *Riley* involved not only adults, but adults whose electronic devices were searched not based on any probationary status but merely incident to their arrests. (*Riley,* at pp. 2480-2482.)

Most parents would be reluctant to examine their child's electronic information indiscriminately. But they would rightly resist a rule that would impose limits on their

ability to review their child's electronic data because such a rule would impede their ability to raise their child effectively. Just as parents should not be disallowed from monitoring their child's electronics use, a juvenile court should not be barred from authorizing searches of designated electronic information accessible through a ward's electronic devices that will help the court determine whether the ward is complying with his or her probation terms. The juvenile court here found that electronic supervision was "very, very important" because of the possibility that K.S. would use electronics to display his use of guns. As we cannot conclude that this concern was irrational, we conclude that the electronics search condition is valid under *Lent*, *supra*, 15 Cal.3d 481 because it is reasonably related to preventing future criminality.

C. The Electronics Search Condition Is Overbroad Because It Is Not Narrowly Tailored to Further K.S.'s Rehabilitation.

Finally, K.S. argues that "the electronics search condition must be stricken as unconstitutionally overbroad because it is . . . narrowly tailored to [neither] the underlying offense nor [him] in particular." We agree that the condition is overbroad.

When a probation condition imposes limitations on a person's constitutional rights, it " 'must closely tailor those limitations to the purpose of the condition' "—that is, the probationer's reformation and rehabilitation—" 'to avoid being invalidated as unconstitutionally overbroad.' " (*Olguin, supra,* 45 Cal.4th at p. 384; *In re Victor L.* (2010) 182 Cal.App.4th 902, 910.) "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the [probationer]'s constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.) " ' "Even conditions which infringe on constitutional rights may not be invalid [as long as they are] tailored specifically to meet the needs of the juvenile." ' " (*In re Tyrell J.* (1994) 8 Cal.4th 68, 82, disapproved on other grounds in *In re Jaime P.* (2006) 40 Cal.4th 128, 130; *In re D.G., supra,* 187 Cal.App.4th at p. 52.)

Although a probation condition imposed on a juvenile must be narrowly tailored to both the condition's purposes and the individual's needs, " ' " 'a condition . . . that would be unconstitutional or otherwise improper for an adult probationer may be permissible for a minor under the supervision of the juvenile court.' " ' " (*In re Victor L.*, *supra*, 182 Cal.App.4th at p. 910, quoting *In re Sheena K.* (2007) 40 Cal.4th 875, 889.) As we have discussed, "[t]his is because juveniles are deemed to be more in need of guidance and supervision than adults, and because a minor's constitutional rights are more circumscribed. The state, when it asserts jurisdiction over a minor, stands in the shoes of the parents. And a parent may 'curtail a child's exercise of . . . constitutional rights . . . [because a] parent's own constitutionally protected "liberty" includes the right to "bring up children" [citation] and to "direct the upbringing and education of children." [Citation.]' " (*In re Antonio R.* (2000) 78 Cal.App.4th 937, 941.) Whether a probation condition is unconstitutionally overbroad presents a question of law that we review de novo. (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143.)

We question whether K.S. properly preserved this claim. As we have mentioned, he did not specify any grounds for his objection to the electronics search condition below, and on appeal he disclaims any argument "that such a condition is per se unconstitutional." We explained in *Ricardo P.* that "[a]lthough a claim that a probation condition is *facially* overbroad presents a question of law, and is therefore preserved without an objection, an overbreadth claim 'premised upon the facts and circumstances of the individual case' is generally forfeited absent an objection." (*Ricardo P.*, *supra*, 241 Cal.App.4th at p. 688, quoting *In re Sheena K.*, *supra*, 40 Cal.4th at p. 885, italics in original.) We nonetheless exercise our discretion to reach the issue, in part because the Attorney General has not argued that it was forfeited. (See *Ricardo P.*, at pp. 688-689.)

K.S.'s claim is the same as the constitutional claim made in *Ricardo P.*: that the electronics search condition infringes upon the minor's constitutional rights to privacy and expression in the way it impacts his cell phone use. (*Ricardo P.*, *supra*, 241 Cal.App.4th at p. 689.) Thus, as we did in that case, "we consider only whether the

condition is overbroad by permitting searches of cell phones and electronic accounts accessible through such devices." (*Ibid.*)

Once again, we conclude that the electronics search condition is overbroad because it is not " 'narrowly tailored for the purposes of public safety and rehabilitation' and 'is not narrowly tailored to [the minor] in particular.' " (*Ricardo P., supra*, 241 Cal.App.4th at p. 689.) The condition's purpose, according to the juvenile court, is to allow monitoring of K.S.'s possession of weapons, but as was true in *Ricardo P.*, the condition "does not limit the types of data on or accessible through his cell phone that may be searched in light of this purpose." (*Ibid.*) Although we disagree with K.S. that no electronics search condition is warranted at all because other conditions of his probation constitute "less restrictive alternatives to meet the state's goal[s] of rehabilitation and public safety," we hold that the condition must be modified to limit authorization of warrantless searches of K.S.'s cell phone data and electronic accounts to "searches of information that is reasonably likely to be relevant to [his] rehabilitation." (*Id.* at p. 690.) Given the court's concern about K.S. posting electronic pictures of himself with weapons, this information includes text messages, photographs, e-mail accounts, and social media accounts. But it does not include other accounts and data that may be contained on or accessed through a cell phone or other electronic device. To the extent these other accounts and data are password protected, K.S. will not be required to disclose the password to them.

In the interest of expediency, and because neither party voiced any opposition at oral argument, we follow the approach of our colleagues in Division Five and modify the condition ourselves to permit searches of "text messages, photographs, e-mail accounts, and social media accounts."[6] (*In re Patrick F., supra*, 242 Cal.App.4th at p. 115.)

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[6] The modification in *Patrick F.* also permitted searches of call logs and voicemail messages. (*In re Patrick F., supra*, 242Cal.App.4th at p. 115.) We do not believe such searches are appropriate here, as they are unlikely to reveal whether K.S. possesses weapons, and his other probation conditions do not prohibit contact with specific individuals.

III.
DISPOSITION

The search condition in the minute order for the February 26, 2015 hearing, which currently reads, "Submit person and any vehicle, room or property, electronics including passwords under your control to search by Probation Officer or peace office[r] with or without a search warrant at any time of day or night," is modified to read: "Submit person and any vehicle, room, or property under your control to search by the probation officer or a peace officer, with or without a search warrant, at any time of the day or night. Submit all electronic devices under your control to a search by the probation officer or a peace officer of any text messages, photographs, e-mail accounts, and social media accounts, with or without a search warrant, at any time of the day or night, and provide the probation or peace officer with any passwords necessary to access the information specified." As so modified, the judgment is affirmed.

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Humes, P.J.

We concur:

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Margulies, J.

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Dondero, J.